Congress of the United States
Washington, DC 20515

April 17, 2007

Mr. Mark Millikin
National Marine Fisheries Service
National Oceanic and Atmospheric Administration
1315 East-West Highway
Silver Spring, Maryland 20910

Dear Mr. Millikin,

We are writing to offer our comments, pursuant to the NOAA announcements of February 14 and March 19, 2007, regarding the Annual Catch Limit provisions, Accountability Measures and related issues arising from passage of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 (MSRA).

The enactment of the MSRA elevates the role of science in the management of our nation's fisheries. This is appropriate, as virtually all stakeholders have urged improvements in fishing research and sought a greater reliance on science in the development of fishery management plans. However, the elevation of science also presents three key challenges, which must be addressed as a regulatory regime for implementation of the new law is developed. Specifically, it is essential that 1) the process by which the scientific information is gathered and analyzed draws from a wide range of sources and methodologies and is reasonably transparent; 2) the science includes serious analysis of the economic and social impacts of management measures as the amended law clearly requires; and 3) the Regional Fishery Management Councils and National Marine Fisheries Service (NMFS) retain the flexibility and the ultimate authority to implement the recommendations of the Scientific and Statistical Committees in ways that are appropriate for the relevant fisheries.

It is also essential that the new law be implemented in a manner that maximizes safety within the commercial fishing industry. Fishing will remain an inherently dangerous job regardless of any steps the government may take. However, it is of utmost importance for fishery managers to avoid any actions which could increase those dangers. No one from New England who makes a living from the sea needs to be reminded of the hazards fishermen face, but the tragic losses of several vessels from the region in recent years have underlined these dangers for members of the general public. Some of the steps that need to be taken to improve safety fall largely outside the scope of the Magnuson Act, and are in the province of the Coast Guard. We are working directly with the Coast Guard and the House Transportation Committee to address these points. But, National Standard 10 remains an integral part of the Act, and, with the adoption of new safety language in the MSRA, it is a statutory mandate that this aspect of the law also receive increased focus as implementing regulations are developed.

We would add that a number of the new initiatives required under the MSRA, as well as some of the specific interpretations of aspects of the new law, involve the need for increased funding, and we urge NMFS to join Congressional supporters of the fishing industry in securing the necessary additional funds. In particular, it is evident that, in order to achieve a level of fishery data quality that will allow for the type of science based fishery management contemplated under the new law, the agency needs to have the ability to gather and analyze fishery data on closer to a real time basis than is currently the norm.

A graphic illustration of the difficulties that can arise under the current system can be seen in the agency's work relating to Section 215 of the MSRA, which called for a study on the impact of New England's Framework 42. Unfortunately, because of a lack of up-to-date data, this study was unable to utilize any data from the final version of Framework 42, which went into effect in November of 2006. The most current available data was from several months before that date, meaning that the study, though it did include useful information, was unable to evaluate the most relevant data for its fundamental purpose. The lack of more current data has prevented fishery managers in New England from doing as good a job as they would have liked in developing Framework 42 and other management measures.

In order to help prevent such occurrences in the future, and to make it more likely that the increased role of scientific information in fishery management that is mandated by the MSRA actually takes place in a meaningful way, it will be necessary to devote more funds to data gathering, technology upgrades and other aspects of fishery management. Again, we urge NMFS to provide these funds, and, to the extent the agency is unable to allocate sufficient levels of funding from its budget to accomplish the actions detailed in this letter, we urge the agency to seek the necessary funds from Congress. We will certainly be supportive of any such efforts.

The above matters and others relating to the implementing regulations for the MSRA are discussed in more detail below.

Role of Scientific and Statistical Committees

As detailed in the colloquy (a copy of which is attached) between Congressman Frank and then-Ranking Resources Committee Member (now Chairman) Rahall during the House Floor debate when the MSRA was passed last year, it is crucial that the Scientific and Statistical Committees (SSC) charged with developing annual catch limits (ACL) and making other scientific recommendations draw upon a wide range of scientific sources and opinion as they perform their duties. This colloquy was an important part of the process of building support for the MSRA's easy passage. Taking into account a wide array of fishery science will help ensure both that the science is as accurate and up to date as possible, and that those in the industry whose activities will be in part governed by the SSCs' findings and recommendations will have higher levels of confidence in the those findings and recommendations. In cases where relevant data is acknowledged to be "poor", SSCs should be encouraged to present a range of ACLs, reflecting varying levels of optimism about rebuilding projections, and economic and social impacts, for consideration by the Regional Fishery Management Councils.

In effect, the SSCs should, to the extent they can, act in ways that are as consistent as possible with traditional understandings of the scientific method, and that use appropriate mechanisms to ensure scientific integrity. This means that membership on the SSCs should in general not include either those who are responsible for gathering the raw data, or those who will decide how the recommendations will be implemented. It will be necessary to develop strong conflict of interest standards to ensure that those who have ties to, or have received funding or grants from, fishing industry organizations, conservation groups, the Federal Government, or other levels of government, disclose that information.

In addition, to the extent possible, the raw data, the analysis thereof, and the ACL and other recommendations that flow from that analysis should be made public in easily accessible fashion in as close to real time as possible, and should be subject to a thorough peer review process (this latter point is discussed in greater detail below). As in the academic world, it would make sense for pre-publication drafts of this information to be made available by means of a publicly accessible web site, and this should be required in the implementing regulations. In addition, the regulations should require that the publicly available information include minority reports or opinions and some discussion of the process by which a consensus or majority opinion was achieved.

It is also essential that the work of the SSCs include focused analysis of the economic and social impacts of scientific findings, as integrated components of the SSCs' scientific work. This reflects not only the importance of National Standard 8, but also the numerous requirements in the MSRA for enhanced consideration of economic and social impacts. In order to ensure that these impacts are fully considered, the implementing regulations should require that specialists in economic and social analysis of fishery management measures be appointed to the SSCs.

Peer Review Process

The MSRA (in Section 103(b)) states that the Secretary and the Councils "may" establish a peer review process. We believe that a genuine peer review process is an essential element in the effort to ensure that the science used to develop fishery management measures is as robust and accurate as possible. A well designed peer review process will lead to increased confidence by fishermen in the data that is used to formulate management measures, which will in turn foster greater levels of cooperation within the industry in developing and complying with the management measures. While it may not be necessary to provide a full peer review for every action or recommendation of the SSCs, we believe it ought to be required for particularly significant recommendations which are likely to have substantial impacts on fisheries or fishing communities In emergency situations, cases where there is insufficient funding to conduct a thorough peer review, or otherwise compelling circumstances in which the time needed to conduct the peer review could potentially compromise an important aspect of fishery management, it may make sense not to conduct a peer review. But, absent those conditions, where a recommended ACL or other important SSC finding or recommendation will have a significant impact on a large fishery or multi-species complex, we believe it should be the policy to require or at least strongly encourage the use of the peer review process, and the regulations should reflect that. Again, if additional funding is necessary in order to achieve this goal, NMFS should request it from Congress.

The peer review process should, in addition to drawing on the expertise of relevant scientific specialists including economists and social scientists, include input from municipal and state government officials, and representatives of non-profit, advocacy groups and trade associations that have involvement in the fishing industry or knowledge or expertise in fishery, ocean, environmental and maritime matters. As in the case of the SSCs' work, the peer review process should be appropriately transparent, with public access to the findings and recommendations, including minority reports or opinions if any, and some discussion of the process by which a consensus or majority opinion was achieved, as well as required disclosure of any information that may be relevant from a conflict of interest perspective.

Role of Regional Fishery Management Councils

While the role of the SSCs in recommending ACLs and relaying other important scientific information is central to the process by which management plans will be developed under the MSRA, the new law's implementing regulations must make it clear that the ultimate authority for determining how to reach the ACL targets lies with the Regional Fishery Management Councils, subject to NMFS approval. There will no doubt in many cases be a range of possible management approaches for achieving a given ACL recommendation, particularly when more than one species is involved, as in a multi-species complex. Whether the recommended ACL should be achieved by means of input or output controls, a quota or point mechanism, or in some other fashion should be decided by those who have been chosen to serve on the Councils based on their own areas of expertise, which will tend to encompass disciplines beyond the purely scientific that will generally be the areas of focus for SSC members. Indeed, this model would follow a well accepted approach for public decision making, in which scientific or technical experts develop recommended targets, after which policy makers determine the best methods for allocating resources into order to achieve those technical goals.

Given the continuing importance of the Councils in the fishery management process, it is vital that increased funds be provided to allow for more time to review relevant documents, scientific findings and recommendations before decisions are made by Council members. This is one more benefit that will result from making fishing data available in real time or very close to it.

In Council deliberations, as in SSC deliberations, there must be an openness to alternative methodologies. The regulations should make it clear that, as with the SSCs, a range of opinions on how to achieve relevant targets should be considered, and significant alternative approaches should not be ignored because of time pressures. In particular, innovative management approaches like the point system that has emerged in New England should be given a full opportunity to be reviewed, especially in multi-species settings, where that concept is most relevant. By the same token, the regulations should make it clear that the Councils should have some authority to shift ACL targets among individual stocks within multi-species complexes (if such stocks are not overfished) provided the total projected level of fishing remains below the overall ACL for the multi-species complex.

Finally, the regulations should make it clear that the input of outside entities that are part of the peer review process should be incorporated into management plans if relevant, and that Council members, as part of the training required under the MSRA, should receive training in economic and social impacts of fishery management measures.

Accountability Measures

The concept of accountability when recommended fishing levels are exceeded is logical, in light of the greater reliance on scientific information under the MRSA. If the necessary financial resources are provided to enhance the overall research and analytical efforts, the instances of significant divergences from projected stock levels will be fewer. On the other hand, the science in this area is still developing, and the roles of non-fishing contributors (including ocean and weather cycles, climate change, and agricultural runoff) on the health of stocks are not fully understood. Thus, there it little doubt that there will continue to be cases of missed targets. However, with the term "accountability measures" undefined in the MSRA, it will be necessary for the Agency to be cautious in developing regulations in this area. The concept of accountability should apply broadly to the entire process of developing projected fishing levels and assessing whether they have been achieved, meaning that the term should apply to the scientific underpinnings of the management measures and the estimates that are used to determine allowable fishing levels, as well as whether the ACL targets are met.

Of particular importance in this discussion, the legislative history on this provision makes it clear that it is not mandatory to deduct "overages" in one year from the subsequent year's allowable level of fishing. The initial Senate-passed version of the new law called for a reduction in fishing effort in the following year by the amount of the previous year's overages. This provision was dropped in the final legislation and replaced by a provision that refers to accountability measures as options. It is clear from this history that overage deductions in the subsequent year, though allowable, are not required. Instead, the regulations should make it clear that there are a range of possible options when ACLs are exceeded.

If, despite the ACL being exceeded, the relevant stock has also exceeded its projected rebuilding levels, no accountability measures might need to be imposed to achieve the law's goals. Alternatively, if the stock levels are determined to require the application of accountability measures, they do not necessarily have to be on a one to one basis (if for example, the relevant stock continues to rebuild at a satisfactory pace), and the accountability measures can also be spread out over a period of years. Furthermore, when it is possible to determine "responsibility" for overages, consideration should be given to allocating accountability measures – if required – on that basis, meaning that efforts should be undertaken to determine the extent to which commercial or recreational fishing activity has played a greater role in any causing overages, taking into account their relative importance within a given fishery or component thereof. Finally, if a stock rebuilds at a significantly faster rate than projected, accountability (for the inaccurate or incomplete science that led to the faulty projections) could mean that higher than anticipated levels of fishing in the subsequent year could be allowed, particularly in the case of a stock that has not been designated as overfished. Accountability must apply in both directions.

The regulations should be drafted so as to reflect all of these possibilities. While the MSRA does not explicitly address accountability in the sense of what should happen when required reductions in fishing effort are met, but the anticipated rebuilding goals are nonetheless not achieved, logic and fairness suggest that in such cases, at a minimum, future ACL recommendations or management measures ought to give greater consideration to alternative models and methodologies, both for rebuilding and for economic and social impacts.

Rebuilding Flexibility

We have long believed that it is vital to amend the Magnuson Act to expand upon and clarify the circumstances under which the standard 10-year rebuilding period can be extended. The previous law allowed – and these provisions were not explicitly changed in the MSRA – three exceptions to the general 10 year rebuilding period: "where the biology of the stock of fish, other environmental conditions, or management measures under an international agreement in which the United States participates dictate otherwise". (16 U.S.C. 1854 § 304(e)(4)(A)(ii).) Regardless of the specific reasons for extension, we strongly believe that all extensions must have a time limit, and must be structured so as to require continued rebuilding and to reach the original rebuilding target by the end of the extension period.

While the rebuilding flexibility language was not extended on a generic basis in the MSRA, the new law does include (in Section 120) language that would permit an extension of up to three years, if certain conditions are met, for summer flounder. Though Section 120 was drafted for the purpose of addressing specific problems within the summer flounder fishery, the section makes it clear that the Secretary of Commerce has the authority to extend rebuilding periods for other species as well. Specifically, Section 120 states that the Secretary has the authority to extend the rebuilding period for summer flounder "only if" the six enumerated conditions are met, and it then adds that nothing in the section shall be construed to amend the Magnuson Act "or to limit or otherwise alter the authority of the Secretary under that Act concerning other species." These provisions should clearly be interpreted to mean that the Secretary can extend the rebuilding periods of other species – though perhaps in less limited ways than for summer flounder – beyond the three general exceptions in the law. There is no scientific basis for restricting these considerations to only one species, and the law clearly recognizes that.

When the biomass targets for several New England species were significantly increased in 2002, NMFS Administrator Hogarth agreed in 2003 to extend the rebuilding period beyond the 10-year limit by "re-starting the clock", which achieved the same purpose as extending the limit beyond 10 years. Considering that 1) the Secretary (acting through the NMFS Director) evidently possessed the authority in 2003 to permit an extension for reasons other than the three grounds explicitly contained in the law; 2) the new law explicitly states that Section 120 does not change that authority; and 3) Section 120 allows an extension for summer flounder "only if" certain conditions are met, it flows logically that the Secretary has and retains the authority to grant extensions for other species for reasons other than the three explicitly in the law, and the MSRA implementing regulations should explicitly so state.

We would add that the six conditions that apply to summer flounder offer a reasonable set of limits for other species, and the Agency may want to consider using those conditions (along with the maximum 3-year extension) for extensions that may apply to other species. But, it is essential in any case that the regulations make it clear that rebuilding extensions for species other than summer flounder for reasons other than the three explicitly in the law are permitted.

Safety

Section 104(a)(5) of the MSRA raises the profile of safety within the Magnuson Act by requiring that the fishery impact statements that are a mandatory part of any Fishery Management Plan or amendment assess, specify and describe the likely effects of the management measures on "the

safety of human life at sea, including whether and to what extent such measures may affect the safety of participants in the fishery". The purpose of this provision is to ensure that safety is considered on an ongoing basis as management measures are developed, as opposed to being addressed on an ad hoc basis following a recognition, because of a vessel sinking or other serious safety concern, that some element of a management measure may inadvertently increase the likelihood of fishing boats being caught in bad weather or other unsafe conditions. While many factors contributed to the losses of the New England boats in recent years, no one can disagree with the idea that management measures should avoid having the effect of making fishing more hazardous.

Several years ago, it became clear, after their adoption, that New England scallop fishery regulations could have the unintended consequence of making fishing more dangerous than it would otherwise be for those who were governed by the regulations. Specifically, the regulations in certain cases barred vessels, once they left a geographically designated fishing area, from returning to that area even if they only chose to leave temporarily to avoid adverse weather conditions. This had the potential to produce situations in which captains faced pressure to remain in hazardous weather zones longer than they normally would. Similarly, other management measures that limit the number of days on a trip or require steaming time to be counted toward Days at Sea limits, can also have this effect. In addition, there is currently no standardized mechanism by which fishing vessels can be assured that breaking off a trip because of impending bad weather will not produce some reduction or penalty in their allocations. Some recent management regulations affecting the New England area have been more sensitive to these concerns, but until the adoption of this new provision in the MSRA, there was no affirmative requirement (beyond the general requirements of National Standard 10) that safety be explicitly considered in the development of management measures. The implementing regulations should as strongly as possible make it clear that safety must be formally considered as each significant management measure is debated and that safety to the extent possible should be made an integral part of such measures.

As in many other areas of human activity, technological improvements in fishing have had mixed results. Vessel Monitoring Systems (VMS) have proven useful from an enforcement perspective, and less so from a safety perspective. We believe it is essential that NMFS continue to promote upgrades in VMS technology in order to expand the methods by which safety can be improved. The need to strengthen VMS technology so its safety applications can be developed was underlined by several participants at a recent public forum on fishing safety in New Bedford, Massachusetts. They expressed some frustration that the technology was not now reliable enough for safety purposes. The Federal Government Representatives at the meeting (including both Coast Guard and NOAA personnel) indicated that additional funding would be necessary in order to achieve the required improvements. We strongly support additional funding for this purpose, and will be joining with the Agency in seeking the funds, but we also urge that the possible expanded use of VMS for safety purposes be incorporated into the regulations that are drafted to implement Section 104(a)(5) of the MSRA.

Limited Access Privilege Programs (LAPP)

Subparagraph 106(c)(6)(D) of the MSRA details the process by which referenda on adoption of LAPPs are to be conducted for the New England and Gulf of Mexico fisheries. Clause (v) of

that subparagraph requires the Secretary to promulgate criteria for determining whether additional fishery participants (other than permit holders) are eligible to vote in a New England referendum "in order to ensure that crew members who derive a significant percentage of their total income from the fishery under the proposed program are eligible to vote in the referendum." As proponents of this provision, we urge that the regulations be drafted so as to give it full effect. Crew members will obviously be affected in significant ways by any program that is adopted under this section of the MRSA, and we strongly believe they should have a say in whether to move forward with a program that will affect their livelihoods. It would be appropriate for the regulations to establish either a specific income percentage or a range of percentages, taking into account crew members' earnings over a period of years including non-fishing earnings, to establish what constitutes a "significant" percentage. But, the percentage should not be set at a level that permits only a small segment of the crew member population in a given area to be eligible to vote. In general, those for whom fishing is their primary means of making a living should be eligible, unless their involvement in the industry has been negligible.

Clause (vi) of subparagraph 106(c)(6)(D) provides that the 2/3 referendum requirement does not apply to sector allocations (as opposed to individual fishing quotas (IFQ), for which the 2/3 requirement does apply). The regulations should make it clear that the term "sector allocation" is intended to apply to relatively small, easily identifiable, discrete components of a fishery, and should not be interpreted to mean, for example, the entire commercial sector in a large geographical area, or a substantial component of a mixed-stock fishery. The mere fact that particular groups self-identify as sectors does not necessarily mean that such groups should be treated as sectors under this subparagraph, absent additional factors relating directly to their methods of fishing that set them apart from others participating in the same fishery. The regulations should clarify that a sector allocation exemption should not lead to a situation in which other participants in the same fishery must comply with an allocation system that operates effectively as an IFQ system, unless there has been in advance an open 2/3 referendum involving all those eligible under the referendum requirements. In general, the regulations should make it clear that the sector allocation exemption cannot be used to evade the 2/3 referendum requirement for IFQs.

The "point system" concept, a version of which has been developed within the New England fishery as a possible mechanism for managing that region's multi-species complex, should not be treated as being subject to the MSRA's LAPP provisions, because a point system does not allocate a quantity of fish or a fixed percentage of a Total Allowable Catch or Annual Catch Limit. Rather, a permit holder has a range of choices on how to access the fishery resource, as is also true, for example, in a Days at Sea format. The implementing regulations should make it clear that a point system would not be governed by the LAPP requirements.

Research Priorities

The MSRA calls for a significant increase in fishery related research, and in Section 103(d) requires a more comprehensive process for establishing research priorities. While there are many areas that would benefit from increased study and analysis, among the areas that we believe would be especially important to designate as priorities, particularly for research relating to New England fisheries, are the following:

* The extent to which similar fish stocks that tend to inhabit different geographical areas should be treated as separate stocks for fishery management purposes. Research conducted by the University of Massachusetts Dartmouth School of Marine Science and Technology has determined that there is considerable migration between Gulf of Maine Cod and Georges Bank Cod populations, raising the question of whether the two stocks (or other stocks that interact in similar fashion) ought to continue to be considered as separate stocks.

* The role of non-fishing related factors, including climate change, agricultural and sewer runoff, and coastal development, in fish stock declines.

* The appropriateness, from an historical perspective, of biomass targets that have been set for various rebuilding stocks.

* The ways in which the role of humans can and should be incorporated into ecosystem management initiatives.

Transition to Sustainable Fisheries

Section 112 of the MSRA expands upon the previous law's provisions relating to vessel and permit buy-back programs. While reducing overcapacity within a fishery can provide important long-term benefits from a sustainability point of view, such programs are obviously also designed in the short-run to reduce fishing activity, and the financial impacts of this reduction go beyond the boat owners and permit holders, affecting also crew members and others who are employed within the industry in shoreside occupations. We have long believed that buy-back programs should be structured so that some of the short-term financial benefit that flows from such programs reaches those who are not boat owners and permit holders, because, as participants in the industry, these other groups are also affected by a reduction in fishing effort in their areas. In general, it is not appropriate for the Federal Government to take action that has a negative financial impact on working people, without providing some form of compensation. Accordingly, we recommend that the MSRA implementing regulations include authority for the Secretary to design, when it is practicable to do so, buy-back programs so as to allow a percentage of the financial gain realized from the programs to be reserved for those who are not boat owners or permit holders.

We appreciate the opportunity to comment on these matters. We are of course available to discuss these points in more detail or if there are any questions.

Rep. Barney Frank

Rep. John Tierney

cc: Dr. William Hogarth, NMFS Administrator
Adm. Conrad Lautenbacher, NOAA Under Secretary
Carlos Gutierrez, Secretary of Commerce

MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT REAUTHORIZATION ACT OF 2006

House of Representatives - December 8, 2006

U.S. House of Representatives
December 8, 2006

Mr. FRANK of Massachusetts. Mr. Speaker, I would ask for a colloquy. One of the key provisions in this is the requirement that the Regional Fishery Management Councils develop annual catch limits based on the Science and Statistical Committees. This annual catch limit provision has the potential to contribute in important ways to the process of improving science. But it is vital that in analyzing the options and preparing recommendations, the committees consider a wide range of scientific opinion to ensure that the management plans that are based on their work represent the best possible scientific understanding of the current state of the relevant fisheries as well as projections for the future.

Is it the ranking member's, soon to be chairman's, understanding that the Science and Statistical Committees will in fulfilling their role under this legislation consider this broad array of scientific opinion and sources?

Mr. RAHALL. Mr. Speaker, will the gentleman yield?

Mr. FRANK of Massachusetts. I yield to the gentleman from West Virginia.

Mr. RAHALL. I appreciate the gentleman's question. I would say that he is entirely correct. In order to help ensure that affected stakeholders have the maximum degree of confidence in the management measures developed by the councils and that those measures are as effective as possible, it is vital that the Science and Statistical Committees operate in an open manner that is receptive to a full spectrum of scientific opinion. Accordingly, it is our expectation that under this legislation, the Science and Statistical Committees would gather information and prepare recommendations in a way that takes into account the research and expertise of a wide range of scientists.